SUPREME COURT OF APPEALS OF VIRGINIA.

NOTTINGHAM *v.* ACKISS.

June 13, 1907.

[57 S. E. 592.]

1. Bills and Notes—Construction—Collateral Agreements.—Where, at the time of the execution of a note in payment for land, the parties executed a written agreement whereby the note, though payable on demand, was only to be paid from the proceeds of sales of the land by the makers, and the payee assigned the note and contract, the assignee only acquired such rights as the payee had, and the note was limited by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 751.]

2. Same—Pleading—General Issue.—In an action by the payee on the note alone, defendants might show the contract under the general issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1603.]

3. Appeal and Error—Questions Not Raised Below.—The question whether detaching the note from the contract and suing on the note alone was such an alteration of the contract within Code 1904, § 2841a, as would avoid the contract, would not be considered on appeal by defendant, the question not having been raised in the trial court until after verdict, upon motion for a new trial and in arrest of judgment, when the plaintiff had no opportunity to explain the circumstances under which the alleged alteration was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1139.]

Error to Law and Chancery Court of City of Norfolk.

Action by one Ackiss against F. E. Nottingham. Judgment in favor of defendant, and plaintiff brings error. Reversed and remanded for a new trial.

Burroughs & Bro., for plaintiff in error.
William McK. Woodhouse, for defendant in error.

BUCHANAN, J. On the 2d day of July, 1905, the plaintiffs in error and O. E. D. Barron made their promissory note, payable to the assignor of the defendant in error, of which the following is a copy:

"Norfolk, Va., July 2nd, 1905.

"$790.00.

"On demand, we promise to pay to the order of Charles F. Hodgman negotiable and payable, without offset, at Seaboard

Bank, Incorporated, of Norfolk, Virginia, seven hundred and ninety * * * dollars, for value received, with costs of collection or any attorney's fees, if incurred, in case payment shall not be made at maturity; and we, the maker or makers, endorser or endorsers, hereby waive the benefit of our homestead exemption as to this debt.

"F. E. Nottingham.
"James T. Nottingham.
"O. E. D. Barron."

At the same time the parties to the note entered into the following agreement:

"This agreement, made and entered into, in duplicate, this 2nd day of July, in the year 1905, between Charles F. Hodgman, party of the first part, and F. E. Nottingham, James T. Nottingham, and O. E. D. Barron, parties of the second part.

"Whereas, the said party of the first part has, by deed of even date herewith, sold and conveyed unto the parties of the second part thirteen lots of land, set out and described in said deed, for the price of $1,190, of which $400 has been paid in cash, and the balance of said purchase price, to wit, $790, is evidenced by the attached note.

"And whereas, it has been agreed by and between the said parties that the said sum of $790 is to be paid to the said parties of the first part out of the proceeds of the sale of the said thirteen lots of land as the same may be sold by the said parties of the second part:

"Now, therefore, this contract, which is executed as a part and parcel of the said attached note for $790, witnesseth: That the said party of the first part agrees that he will not demand payment of said note for $790, and hereto attached, except and until sale may be made of said thirteen lots of land, or any part thereof, but shall only demand payment of such and all sums as may be realized upon a sale of said lots of land, in whole or in part, as the same may be sold.

"The said parties of the second part agree to pay to said party of the first part all and any sums of money which may arise out of the sale of said lots, in whole or in part as the same may be sold, and further agrees to use all due diligence in effecting sale thereof.

"Witness the following signatures and seals.

"C. F. Hodgman. [Seal.]
"F. E. Nottingham. [Seal.]
"James T. Nottingham. [Seal.]
"O. E. D. Barron. [Seal.]

"Witness: Wm. McK. Woodhouse."

The payee in the note indorsed and delivered these writings to the defendant in error, who instituted an action of debt on the note alone; no reference being made in the declaration to the agreement. The plaintiffs in error pleaded the general issue and tendered three special pleas, the first and third of which were rejected.

Upon the trial of the cause the defendant in error offered in evidence the note without the agreement, and rested. The plaintiffs in error introduced the agreement in evidence. Upon these writings and the other evidence before the jury there was a verdict and judgment in favor of the defendant in error for the amount of the note sued on. To that judgment this writ of error was awarded.

Numerous errors are assigned, but in the view we take of the case it will be unnecessary to deal with them specifically. The decision of the case turns upon the effect of the agreement of July 2, 1905, upon the note sued on.

It is well settled by the decisions of this court that a writing indorsed on a bond at the time of its execution, operating in favor of the obligor and signed by the obligee, is to be considered as part of the condition of the bond. Peyton *v.* Harman, 22 Grat. 643, 645; Smith *v.* Spiller, 10 Grat. 318; Price *v.* Kyle, 9 Grat. 247; Shermer *v.* Beale, 1 Wash. 11, 14; Gordon *v.* Frazier, 2 Wash. 130.

The case of Carter *v.* Noland, 86 Va. 568, 10 S. E. 605, 6 L. R. A. 693, in which it was held that, to make a subsequent agreement respecting a bond a part thereof, it must be so ingrafted upon the bond that the original and ingrafted matter shall constitute inseparable parts of an entire instrument, does not question the correctness of the decisions of this court cited above, but only held that the principles announced by them ought not to be extended to a case where the indorsement on the bond amounted to no more than a mere promise to refrain from the exercise of a matured right for a limited time.

The note sued on and the agreement to which it was attached were made at the same time, and the latter in terms expressly declares that it was executed as part and parcel of the note. It is clear, therefore, that the two writings together constitute the contract between the original parties to them, and that the defendant in error only acquired such rights by their indorsement and delivery to him as the payee in the note had. The declarations set out a contract to pay money on demand and absolutely, when it was only payable on certain conditions. To put that question in issue, a special plea was not necessary. The general issue (nil debit) did not, and upon it there should have been a verdict for the defendants. Newell *v.* Maybury, 3 Leigh, 250, 253, 23 Am. Dec. 261; Smith *v.* Spiller, 10 Gratt. 318, 322. The

verdict of the jury in favor of the plaintiff should, therefore, have been set aside and a new trial awarded upon the motion of the defendant.

Whether or not detaching the note from the said agreement and bringing suit upon the note alone was such an alteration of the contract, within the meaning of our decisions or Code 1904, § 2841a, art. 8, as would avoid the contract, ought not to be considered by this court at this time. That question was not raised in the trial court until after verdict, upon motion for a new trial and in arrest of judgment, when the plaintiff had no opportunity to explain the circumstances under which the alleged alteration was made.

It is unnecessary, and might be improper, to consider any of the other assignments of error, as upon the next trial the issues and proof may, and most probably will, be different.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded, with leave to the plaintiff, if he be so advised, to amend his declaration, and for a new trial.

Note.

It would seem that even though it was not recited on the face of the contract attached to the note that it was to be paid only upon the fulfillment of a certain condition, extrinsic evidence might nevertheless have been introduced to show this collateral agreement. For it is one of the exceptions to the general rule excluding parol evidence, that such evidence is admissible to connect two or more instruments evidencing the same transaction, where the connection does not appear on their face. See Tuley *v.* Barton, 79 Va. 387; Pollock *v.* Glassel, 2 Gratt. 439.

Brown on Parol Ev., § 50, says: "Where the instrument does not express the entire agreement, and does not appear to express the entire agreement, or there is a collateral agreement not embraced therein, parol evidence is competent to show the omitted part, whether contemporaneous or antecedent, if it does not conflict with the instrument." Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686; Rymer *v.* South Penn Oil Co., 54 W. Va. 530, 537, 46 S. E. 559.

MERRITT *v.* BUNTING.

June 13, 1907.

[57 S. E. 567.]

1. Public Lands—State Lands—Grants—Description—Sufficiency.—A grant of land from the state, which does not show where the land intended to be granted is located, except that it is on an island and is embraced within courses and distances, but which fails to give the starting point or ending point, and which does not identify the